# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE MEDINA, :

Plaintiff, : CIVIL ACTION

:

v. :

:

CITY OF PHILADELPHIA, et al., : No. 03-1971

**Defendants.** :

# MEMORANDUM AND ORDER

Schiller, J. May 19, 2004

Plaintiff Jose Medina commenced this civil rights action under 42 U.S.C. § 1983 against the City of Philadelphia, Warden Reginald Hammond, Deputy Warden Marco Giannetta, Sergeant George McNally, Corrections Officer Augustine Arroyo and Corrections Officer Joseph Moore. In his complaint, Plaintiff alleges that while he was incarcerated at the Curran-Fromhold Correctional Facility ("CFCF"), Defendants searched his cell and unlawfully confiscated his manuscript and read his mail in violation of the First and Fourteenth Amendments to the United States Constitution and the prison's mail policy. Presently before the Court is Defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). For the reasons set forth below, Defendants' motion is granted.

<sup>&</sup>lt;sup>1</sup> Plaintiff brings suit against Defendants Hammond, Giannetta, McNally, Arroyo and Moore in both their individual and official capacities.

<sup>&</sup>lt;sup>2</sup> Defendants' entitle their motion "Motion for Summary Judgment and Motion to Dismiss." As both parties cite to materials outside of the pleadings, however, the motion is appropriately addressed as a motion for summary judgment. *See* FED. R. CIV. P. 12(b) & 56(c).

# I. FACTUAL BACKGROUND

At all times relevant to this action, Plaintiff was incarcerated at CFCF. Before he was incarcerated, Plaintiff had been working on a manuscript about the Latin Kings, a group formed in Chicago in 1949. (Pl.'s Dep. at 16, 44.) Although the Latin Kings are commonly referred to as a "gang," Plaintiff claims it is "an organization, people who just work together to help people." (*Id.* at 49.) Because Plaintiff is not a member of the Latin Kings, he gathered information for his book through interviews with current members before he was incarcerated. (*Id.* at 48.)

When he entered CFCF, Plaintiff asked his mother to send him the manuscript so that he could continue working on it while incarcerated. (*Id.* at 16.) On February 27, 2003, shortly after Plaintiff received the manuscript in the mail, Defendants McNally and Arroyo came to his cell and informed him that they were going to search for cigarettes. (*Id.* at 20.) Arroyo picked up a pack of mail within Plaintiff's cell and began looking through the letters. (*Id.*) Arroyo then pulled out a yellow envelope marked "legal mail" which contained Plaintiff's writings and said, "Here it is," to McNally. (*Id.* at 20-21, 24.) Plaintiff asked why the officers were taking his mail and they informed him that it violated prison policy. (*Id.* at 21.)

Approximately eight months later, on October 1, 2003, Defendants McNally and Moore confiscated a second manuscript from Plaintiff's cell. (*Id.* at 40.) This second manuscript was confiscated pursuant to a "major shakedown." (*Id.*) Plaintiff stated that this second set of materials

<sup>&</sup>lt;sup>3</sup> Plaintiff admits that he believed by instructing his mother to mark the envelope "legal mail" he would receive it more quickly and prison staff would not read it. He also admits that the envelope did not contain legal mail. (Pl.'s Dep. at 24.)

<sup>&</sup>lt;sup>4</sup> Although not defined in the deposition transcript, "major shakedown" appears to refer to a prison-wide search of prison cells for contraband.

was to become part of the same book as the first manuscript (*Id.* at 40-41.) After this lawsuit was filed, Plaintiff alleges that he suffered various forms of retaliation, including being relieved of his job and being denied access to the law library and school facilities. (*Id.* at 71.)

# II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (1994); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. Anderson, 477 U.S. at 248. In order to meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. Celotex, 477 U.S. at 324. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. See Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000); see also Goodman v. Pa. Tpk. Comm'n, 293 F.3d 655, 665 (3d Cir. 2002).

#### III. DISCUSSION

Plaintiff brings his claims for constitutional violations pursuant to 42 U.S.C. § 1983, which requires him to demonstrate that a person acting under color of state law deprived him of a federal right. *Gorman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995). Defendants do not dispute that they are state actors for purposes of § 1983. The issue, therefore, is whether Defendants' conduct violated Plaintiff's constitutional rights.

#### A. Claims Against Defendants in their Individual Capacities

Plaintiff brings claims against Defendants Hammond, Giannetta, McNally, Arroyo, and Moore in their individual capacities. Claims against government officials in their individual capacities seek to impose personal liability upon a government officer for actions taken under color of state law. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Thus, to establish individual liability in a § 1983 action, a plaintiff must "show that the official, acting under color of state law, caused the deprivation of a federal right." *Id.* As the Third Circuit has made clear, "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs" to be held liable. *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003) (*quoting Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988)). Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. *Rode*, 845 F.2d at 1207.

Although Hammond and Giannetta were sued in their individual capacities, Plaintiff has failed to produce any evidence that either of these Defendants were personally involved in the alleged wrongs. In his response to Defendants' motion for summary judgment, Plaintiff fails to differentiate between the claims against these Defendants in their official and individual capacities, subsuming all discussion of these Defendants under the heading "Monell Claim." In his discussion

of this claim, Plaintiff fails to present any evidence that either Hammond or Giannetta were personally involved in the censorship or reading of his mail, the confiscation of his manuscripts, or any alleged retaliatory behavior. Furthermore, Plaintiff fails to provide record evidence that either Hammond or Giannetta were actually aware of the events at issue. *See id.* at 1208 (noting that mere filing of grievances or complaints with official's office is not enough to show actual knowledge). Plaintiff notes only that these Defendants "were responsible for running the prison." (Pl.'s Resp. at 20.) As respondeat superior is not a basis for liability under § 1983, *Mabine v. Vaughn*, 25 F. Supp. 2d 587, 592 (E.D. Pa. 1998), and in the absence of any other basis for liability, Plaintiff's claims against Defendants Hammond and Giannetta in their individual capacities are dismissed from this suit.

Accordingly, the remainder of the Court's analysis of the individual-capacity claims relates only to Defendants McNally, Arroyo, and Moore.

# 1. Confiscation of Manuscript in Violation of First Amendment

Plaintiff alleges that Defendants McNally, Arroyo, and Moore confiscated his Latin Kings manuscript in violation of his First Amendment rights. Defendants move for summary judgment arguing that Plaintiff's manuscripts were confiscated pursuant to a legitimate penological interest.

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). In *Turner v. Safley*, the Supreme Court articulated four factors that should be considered in determining the constitutionality of a prison's restrictions on free speech: (1) whether a valid, rational connection exists between the regulation and the government interest it protects; (2) whether prisoners have alternative means of exercising the protected right;

(3) the impact of accommodating the right on other inmates, guards, and the allocation of prison resources generally; and (4) whether alternatives exist that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987); *Fraise v. Terhune*, 283 F.3d 506, 513-14 (3d Cir. 2002).

In conducting the *Turner* analysis, courts must remain cognizant that "[t]he judiciary is 'illequipped to deal with the . . . problems of prison administration' . . . and should therefore give significant deference to judgments made by prison officials in establishing, interpreting, and applying prison regulations." *Fraise* 283 F.3d at 515 (*quoting Turner*, 482 U.S. at 84). Such deference, however, does not amount to an abdication of the court's responsibility to protect the constitutional rights of prisoners. "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Prounier v. Martinez*, 416 U.S. 396, 405-06 (1974); *see also Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

Defendants' brief offers less than one page of text applying the first three *Turner* factors to the facts of this case and fails to address the fourth factor at all. (Defs.' Mot. for Summ. J. at 12.) In discussing the first factor, Defendants state that the government has an interest in prohibiting "gang-related materials" in CFCF "for the obvious reason that they pose a threat to the safety and security of the institution," (*id.*), and attach the affidavit of Dofredo Pieretti, the Security Threat Group Coordinator for the Philadelphia Prison System ("PPS"), who opines that the confiscated manucripts constitute "recruitment" materials that pose a threat to prison security because they "promote[] the continuance of membership in a group that has been recognized by Law Enforcement agencies as a threat, in and out of the prison walls." (Pieretti Aff. at ¶¶ 29, 31). Plaintiff counters

that although the manuscript is about the Latin Kings, it is not "gang-related" in the sense of posing a threat to prison security, especially as it remains within the confines of his cell. Similarly, Plaintiff testified that he is not a member of the Latin Kings and is writing this manuscript on the history of the Latin Kings for eventual publication, rather than for recruitment purposes. (Pl.'s Dep. at 16, 25, 49-50.) Furthermore, Plaintiff received information for the book from interviews with current members of the Latin Kings, none of whom were incarcerated at the time of the interview. (*Id.* at 39, 49.) Therefore, viewing the facts in the light most favorable to the Plaintiff, the Court is unable to conclude from Pieretti's vague opinions that the manuscripts constituted "gang-related" material and threatened security within the prison.

Because Plaintiff has not been generally prohibited from receiving mail or writing manuscripts, there is no dispute regarding whether Plaintiff has alternative means of exercising this protected right under the second *Turner* factor. *Fraise* 283 F.3d at 518 (noting that analysis of the second prong must examine inmate's ability to exercise of the right "generally... not whether [the] inmate has alternative means of engaging in [any] particular practice"). In support of the third factor, Defendants assert only that "[i]f the PPS were to allow written gang-related material to float freely around the prisons, it arguably would have a deleterious impact on other inmates, guards, and the allocation of prison resources." (Defs.' Mot. for Summ. J. at 12.) Nothing in the record, however, suggests that Plaintiff was conducting recruiting activities within the prison, distributing these materials outside of his cell, or even showing them to anyone. Rather, Plaintiff testified that he did not want anyone to see the manuscript because he thought that would inhibit its eventual publication. (Pl.'s Dep. at 25.) Moreover, Defendant McNally admitted that the material contained nothing that would incite the prison population to commit violence against other prisoners. (McNally Dep. at

56.) Therefore, the evidence in the record does not support the conclusion that accommodation of Plaintiff's right would negatively impact guards, other inmates, and prison resources generally.

Finally, Defendants' failure to address the fourth *Turner* factor is particularly noteworthy, given that the danger Defendants ascribe to Plaintiff's writings could arguably be eliminated as long as Plaintiff keeps the writings in his cell. *See Abu-Jamal v. Price*, 154 F.3d 128, 135 (3d Cir. 1998) ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.") (*quoting Turner*, 482 U.S. at 90). As such, having reviewed Plaintiff's manuscripts and the parties' moving papers, the Court finds that there are disputed issues of material fact regarding whether Plaintiff's manuscripts pose a threat to prison security such that confiscation was justified under the *Turner* factors. *See Procunier*, 416 U.S. at 415 (noting that prison officials violate First Amendment when for reasons unrelated to valid penological interests they engage in "censorship of... expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate'").

The conclusion that Plaintiff has presented a viable First Amendment claim against Defendants for confiscation of his manuscripts compels this Court to address the issue of qualified immunity. Under the doctrine of qualified immunity, governmental officials performing discretionary functions are entitled to qualified immunity from liability arising out of conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The analysis of whether qualified immunity protects an official from liability for allegedly unlawful actions by turns on the "objective reasonableness" of the action "assessed in light of legal rules that were clearly established at the time action was taken." *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The contours

of the right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The doctrine of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In this case, in order to be liable, the Court must conclude that Defendants should have known that their particular actions, i.e. confiscating Plaintiff's manuscripts on the Latin Kings, violated Plaintiff's clearly established rights under the First Amendment. Although this Court concluded that the confiscation of Plaintiff's manuscripts may not have been supported under the Turner factors, the Court is unable to conclude that Defendants' confiscation of the manuscripts was in violation of clearly established law. Courts routinely recognize a prison's right to limit prisoner's access to materials that potentially threaten prison security. Turner, 482 U.S. at 91 (holding that prison regulation limiting inmate-to-inmate correspondence was logically related to legitimate security concern that such communication fosters prison gang activity); Thornburgh v. Abbot, 490 U.S. 401, 412 (1989) (upholding prison regulation restricting prisoners' receipt of certain publications and specifically noting danger that prisoners may recognize gang affiliations based on particular materials possessed by inmates). As the Latin Kings are a well-known street gang that has been involved in violent activity both inside and outside prison walls, (Pieretti Aff. ¶ 18), this Court must conclude that Defendants reasonably determined that Plaintiff's manuscripts posed a security threat to the institution and thus their actions did not violate clearly established law. Therefore, the Court concludes that the doctrine of qualified immunity shields these Defendants from liability.

2. Reading of Mail in Violation of First Amendment and Prison Mail Policy

Plaintiff alleges that Defendants violated his First Amendment rights and the prison mail

policy by reading his mail before it was delivered to his cell. While it is true that "prison authorities

do not possess unfettered discretion to censor or restrict and inmate's mail," *Gray v. Creamer*, 465 F.2d 179, 186 (3d Cir. 1972), Plaintiff has provided no evidence that any of the named Defendants had any personal involvement in the alleged reading of Plaintiff's mail. *See Sutton*, 323 F.3d at 249 ("Under our cases, '[a] defendant in a civil rights action must have personal involvement in the alleged wrongs' to be liable.") (*quoting Rode*, 845 F.2d at 1207). In support of this claim, Plaintiff merely asserts that:

[T]he timing of the Defendants confiscation of his manuscript is highly suggestive of a casual [sic] link between Defendants' illegal reading of Plaintiff's mail and the confiscation of the manuscript on February 27, 2003 . . . . the only way that Defendant McNally and Defendant Arroyo could have known about the manuscript was because they read Plaintiff's mail the day before."

(Pl.'s Resp. at 22-23.) As Plaintiff has failed to adduce anything beyond conjecture in support of this allegation, Defendants are granted summary judgment on these claims.

# 3. Fourteenth Amendment Due Process Claim<sup>6</sup>

Plaintiff claims that his manuscripts were taken in violation of the Due Process Clause of the Fourteenth Amendment because he did not receive a post-deprivation hearing in accordance with

<sup>&</sup>lt;sup>5</sup> Plaintiff's deposition transcript similarly reveals the speculative basis of these allegations. When asked how he knew that Defendants were reading his mail, Plaintiff responded: "I didn't say – I didn't say them specifically reading my mail, just that, like, they reading my mail probably before I get it because how would they know what is written on there, you know . . . . So that gave me the hint, like, who knew – how do they know what is there? You know, that's how I feel that they are reading my mail." (Pl.'s Dep. at 29.)

<sup>&</sup>lt;sup>6</sup> Plaintiff's Fourth Amended Complaint vaguely states that Defendants also violated Plaintiff's rights pursuant to the Equal Protection Clause of the Fourteenth Amendment. (Fourth Am. Comp. ¶ 4.) Plaintiff has not addressed this claim in response to Defendants' Motion for Summary Judgment. To the extent Plaintiff has not abandoned this claim, Defendants' motion for summary judgment on Plaintiff's Equal Protection claim is granted, as Plaintiff has not presented any evidence in support thereof. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)

prison guidelines. It is undisputed that Plaintiff did not receive a hearing because Sergeant McNally failed to prepare a violation report after each of the confiscation incidents. (Giannetta Dep. at 15-18.) Defendant moves for summary judgment on Plaintiff's due process claim on the ground that adequate post-deprivation remedies are available under state tort law.

In *Hudson v. Palmer*, the Supreme Court held that deprivations of property caused by the negligent or intentional misconduct of prison officials do not infringe constitutional due process provided that adequate state post-deprivation remedies exist.<sup>7</sup> 468 U.S. 517, 533 (1983); *Reid v. Seville*, No. Civ. A. 96-2577, 1996 WL 421901, at \*4, 1996 U.S. Dist. LEXIS 10319, at \*10-11 (E.D. Pa. July 19, 1996) (finding Pennsylvania Tort Claims Act, 42 PA. Cons. STAT. Ann. § 8550, adequate post-deprivation remedy precluding due process claim); *Williams v. Frame*, 821 F. Supp. 1093, 1098 (E.D. Pa. 1993) (same). In this case, Plaintiff claims that his due process rights were violated as a result of Sergeant McNally's unauthorized conduct of not filing a proper violation report. As Plaintiff may pursue an action under Pennsylvania state tort law, Plaintiff's Due Process claim based on the confiscation of his property is not actionable.

#### 4. Conspiracy to Violate Constitutional Rights

"In order to prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law conspired to deprive him of a federally protected right." *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 254 (3d Cir. 1999). As Plaintiff has failed to offer

<sup>&</sup>lt;sup>7</sup> In his response brief, Plaintiff relies on *Sandin v. Conner*, 515 U.S. 471 (1995). *Sandin* holds that prison regulations may create liberty interests protected by the Due Process Clause but that such interests "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. As Plaintiff's allegations concern the deprivation of property and not liberty, *Hudson* provides the correct standard for analysis of Plaintiff's claim.

any evidence of an agreement to deprive him of constitutional rights, Defendants' motion for summary judgment on this claim is granted.

#### 5. *Retaliation*

Plaintiff claims that Defendants retaliated against him for filing this civil action by denying him use of the law library and education facilities, depriving him of employment, and confiscating his second manuscript on October 1, 2003. As Plaintiff has failed to produce evidence that any of the named Defendants were involved in Plaintiff's employment, law library access, or education opportunities, Defendants are granted summary judgment on Plaintiff's claims of unconstitutional retaliation relating to these allegations. See Sutton, 323 F.3d at 249 ("Under our cases, '[a] defendant in a civil rights action must have personal involvement in the alleged wrongs' to be liable.") (quoting Rode, 845 F.2d at 1207). Defendants McNally and Moore, however, were involved in the confiscation of Plaintiff's second manuscript. Accordingly, the Court's analysis of Plaintiff's retaliation claim proceeds only with respect to this second confiscation.

To demonstrate a retaliation claim, a prisoner plaintiff must establish the following elements: (1) he engaged in constitutionally protected conduct; (2) he suffered adverse action at the hands of prison officials; and (3) his constitutionally-protected conduct was a substantial or motivating factor in the decision to discipline him. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001). Once a prisoner has demonstrated his prima facie case, the burden shifts to the defendant to prove by a preponderance of the evidence that the defendant "would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." *Id*.

<sup>&</sup>lt;sup>8</sup> In fact, Plaintiff admitted that the named Defendants were not responsible for denying him employment, library access, and educational opportunity. (Pl.'s Dep. at 113-14.)

Plaintiff has established the first two elements of his prima facie case. Plaintiff's filing of a civil action alleging constitutional violations within prison is clearly constitutionally protected conduct. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Under Third Circuit precedent, an adverse action is any action "sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights." *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000). Certainly, confiscation of a manuscript could deter a prisoner from exercising his constitutional right to petition the court to redress future grievances. To meet the third element of his prima facie case, however, Plaintiff must produce evidence demonstrating a causal link between the filing of the instant suit and the confiscation of his second manuscript. *See Rauser*, 241 F.3d at 333. The only evidence Plaintiff presents to the Court in support of the causation requirement is temporal proximity.

While temporal proximity between the exercise of a constitutionally protected right and the adverse action may support an inference of causation, *id.* at 334, over six months had elapsed between the time Plaintiff filed his lawsuit on March 28, 2003 and the confiscation of his second manuscript on October 1, 2003. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (noting that additional evidence of causation required when timing alone is not "unduly suggestive"). Plaintiff has failed to point to any additional evidence from which a reasonable jury could conclude that prison officials seized his second manuscript as a penalty for exercising his constitutional rights. In fact, a review of the record reveals uncontradicted evidence that the second manuscript was seized as part of a routine cell search for contraband. (Moore Dep. at 11, 20, 28.) As Plaintiff has failed to demonstrate evidence meeting his prima facie case for retaliation, Defendants' motion for summary judgment on this claim is granted.

#### B. *Monell* Claims

Plaintiff has asserted a *Monell* claim against Defendant City of Philadelphia. In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that § 1983 may give rise to municipal liability when a constitutional violation occurs as a result of a policy, regulation, or decision officially adopted by the municipality or informally adopted by custom. The Third Circuit has elucidated the differences between policies and customs under *Monell*:

Policy is made when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well settled" as to virtually constitute law.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). Custom may also be established by evidence of knowledge and acquiescence, "i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury." *Bielevicz*, 915 F.2d at 851. Proof of the mere existence of an unlawful policy or custom, however, is not enough. In order to sustain a claim for municipal liability under § 1983, a plaintiff must show that the municipal practice was the proximate cause of his injury. *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990).

Plaintiff argues that Defendants' failure to respond to Plaintiff's internal complaints concerning the illegal confiscation of his manuscript amounts to a municipal custom exposing

<sup>&</sup>lt;sup>9</sup> Plaintiff also brings claims against Defendants Hammond, Giannetta, McNally, Arroyo, and Moore in their official capacities. Where a suit is brought against a public officer in his official capacity, the suit is treated as if the suit were brought against the governmental entity of which he is an officer. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985).

Defendants to liability under *Monell*. In support, Plaintiff cites to several internal prison grievance forms introduced as exhibits in his deposition. Only two of the grievance forms, however, even mention the confiscated manuscript, (Pl.'s Dep. at 83, 86; Ex. D-4 (Grievance Form 3/3/03), Ex. D-13 (Grievance Form 10/1/03)), and Plaintiff has not presented any deposition testimony or documentary evidence demonstrating official awareness of previous similar events.<sup>10</sup> Similarly, Plaintiff has produced no evidence regarding the prison's procedures for confiscating inmate materials or responding to inmate grievances from which one could infer a custom of permitting unlawful confiscation of materials. Although a municipalities' awareness of and acquiescence to unlawful conduct can result in liability under Monell, Plaintiff has not adduced any evidence from which a reasonable jury could find a custom of illegal confiscation of inmate materials. Cf. Beck v. City of Pittsburgh, 89 F.3d 966, 973-75 (3d Cir. 1996) (noting numerous previous complaints of similar nature in narrow time period, deficient investigation procedures, and official internal report from which jury could find custom of failing to protect civilians from police misuse of force); Bielevicz, 915 F.2d at 852 (noting testimony of two police chiefs and officer enough to support jury inference of "long-established custom" of arresting individuals for public drunkenness without probable cause). Accordingly, Defendants' motion for summary judgment on Plaintiff's Monell claim is granted.

# IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted. In this

<sup>&</sup>lt;sup>10</sup> In fact, the Court was not presented with any of the deposition testimony of Defendants Hammond or Giannetta.

case, the Court is prevented from allowing Plaintiff's First Amendment claims to proceed because I have found qualified immunity and because of Plaintiff's failure to present evidence of a viable *Monell* claim. Let there be no question, however, of this Court's deep concern that the confiscation of a prisoner's writings raises grave questions regarding when First Amendment rights must give way to legitimate penological interests and the appropriate role of prison officials and the courts in making that determination. Prison regulations limiting prisoner's First Amendment freedoms should be drafted and applied carefully and with due deference to the values the First Amendment was designed to protect, especially when such regulations impinge on a prisoner's possession of personal writings within the confines of his cell, as such acts tread dangerously close to regulation of the prisoner's thoughts themselves.

An appropriate Order follows.

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE MEDI	NA,	:	
	Plaintiff,	:	CIVIL ACTION
		:	
	<b>v.</b>	:	
		:	N. 03 1081
THE CITY OF PHILADELPHIA, et al., Defendants.		:	No. 03-1971
	Defendants.	•	
<u>ORDER</u>			
AND NOW, this 19 <sup>th</sup> day of May, 2004, upon consideration of Defendants' Motion for			
Summary Jud	lgment and Motion to Dismiss	s, Plaintiff Jose	Medina's response thereto, and for the
foregoing rea	sons, it is hereby <b>ORDERED</b>	that:	
1.	Defendants' Motion for Summary Judgment and Motion to Dismiss (Document No.		
	46) is <b>GRANTED</b> .		
2.	Judgment is entered in favor of the Defendants and against Plaintiff.		
		BY T	HE COURT:

Berle M. Schiller, J.